Brandy Mining, Inc. *and* United Mine Workers of America, AFL–CIO. Case 9–CA–33095

February 29, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

Upon a charge and amended charge filed by the Union on July 18 and August 7, 1995, the General Counsel of the National Labor Relations Board issued a complaint on September 1, 1995, against Brandy Mining, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent failed to file an answer.

On January 26, 1996, the General Counsel filed a Motion for Summary Judgment with the Board. On January 30, 1996, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

Sections 102.20 and 102.21 of the Board's Rules and Regulations provide that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively notes that unless an answer is filed within 14 days of service, all the allegations in the complaint will be considered admitted. Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Region, by letters dated December 11, 1995, and January 10, 1996, notified the Respondent that unless an answer were received by December 21, 1995, or January 22, 1996, respectively, a Motion for Summary Judgment would be filed.[1]

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

[1] The letters were returned to the Regional Office marked "Box closed, Unable to forward," and "Moved, Left no address." It is well established, however, that a respondent's failure to provide for service of documents cannot defeat the purposes of the Act. See *National Automatic Sprinklers*, 307 NLRB 481 fn. 1 (1992).

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with two mines located in Logan County, West Virginia, has been engaged in the contract mining of coal. During the 12-month period ending July 31, 1995, the Respondent, in conducting its business operations, performed services valued in excess of $50,000 for Island Creek Coal Company, a nonretail enterprise located within the State of West Virginia. During the same 12-month period, Island Creek Coal Company, in conducting its coal mining operations, sold and shipped from its Logan County, West Virginia facility goods valued in excess of $50,000 directly to points outside the State of West Virginia. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The following employees of the Respondent (the unit) constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All employees of Brandy Mining, Inc. engaged in the production of coal, including removal of overburden coal waste, preparation, processing, and cleaning of coal and transportation of coal (except by waterway or rail not owned by Brandy Mining, Inc.), repair and maintenance work normally performed at the mine site or at the central shop(s) of Brandy Mining, Inc. and maintenance of gob piles and mine rooms, and work the type customarily related to all of the above at the coal lands, coal producing and coal preparations facilities owned or operated by Brandy Mining, Inc., excluding all coal inspectors, weigh bosses at mines where men are paid by ton, watchmen, clerks, engineering and technical employees and all professional employees, guards and supervisors as defined in the Act.

Since February 22, 1994, and at all material times, the Union has been the designated exclusive collective-bargaining representative of the unit and since that date has been recognized as such representative by the Respondent. This recognition is embodied in a collective-bargaining agreement that is effective from December 16, 1993, to August 1, 1998. At all times since February 22, 1994, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

Since about February 18, 1995, and continuing to date, the Respondent has failed to continue in effect all

the terms and conditions of the agreement by failing to maintain healthcare benefits as required by the collective-bargaining agreement. The terms and conditions of employment described above are mandatory subjects for the purposes of collective bargaining. The Respondent engaged in this conduct without prior notice to the Union, without the Union's consent, and without affording the Union an opportunity to bargain with respect to this conduct and its effects.

CONCLUSION OF LAW

By the acts and conduct described above, the Respondent has been failing and refusing to bargain with the exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(d) of the Act and in violation of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) and (5) by failing, since about February 18, 1995, to maintain healthcare benefits for the unit employees, we shall order the Respondent to honor the terms of the 1993–1998 collective-bargaining agreement, and to make whole its unit employees by making all contractually required healthcare benefit payments or contributions, including any additional amounts applicable to such delinquent payments as determined in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979). In addition, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make such required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[2]

ORDER

The National Labor Relations Board orders that the Respondent, Brandy Mining, Inc., Logan County, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with United Mineworkers of America, AFL–CIO, the exclusive bargaining representative of the employees in the appropriate unit set forth below, by failing to maintain healthcare benefits, as required by the collective-bargaining agreement. The unit is:

> All employees of Brandy Mining, Inc. engaged in the production of coal, including removal of overburden and coal waste, preparation, processing, and cleaning of coal and transportation of coal (except by waterway or rail not owned by Brandy Mining, Inc.), repair and maintenance work normally performed at the mine site or at the central shop(s) of Brandy Mining, Inc. and maintenance of gob piles and mine rooms, and work the type customarily related to all of the above at the coal lands, coal producing and coal preparations facilities owned or operated by Brandy Mining, Inc., excluding all coal inspectors, weigh bosses at mines where men are paid by ton, watchmen, clerks, engineering and technical employees and all professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Comply with the terms of the 1993–1998 collective-bargaining agreement retroactive to February 18, 1995, by making all contractually required healthcare benefit payments or contributions, and make whole the unit employees for any loss of benefits or expenses ensuing from its failure, since about February 18, 1995, to make required healthcare benefit payments or contributions, as set forth in the remedy section of this Decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at its facilities in Logan County, West Virginia, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous

[2] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the Employer's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

Dated, Washington, D.C. February 29, 1996

William B. Gould IV, Chairman

Margaret A. Browning, Member

Charles I. Cohen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to bargain collectively with United Mineworkers of America, AFL–CIO, the exclusive collective-bargaining representative of our employees in the unit set forth below, by failing to maintain healthcare benefits. The unit is:

> All employees of Brandy Mining, Inc. engaged in the production of coal, including removal of overburden and coal waste, preparation, processing, and cleaning of coal and transportation of coal (except by waterway or rail not owned by Brandy Mining, Inc.), repair and maintenance work normally performed at the mine site or at the central shop(s) of Brandy Mining, Inc. and maintenance of gob piles and mine rooms, and work the type customarily related to all of the above at the coal lands, coal producing and coal preparations facilities owned or operated by Brandy Mining, Inc., excluding all coal inspectors, weigh bosses at mines where men are paid by ton, watchmen, clerks, engineering and technical employees and all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL honor the terms of the 1993–1998 collective-bargaining agreement, retroactive to February 18, 1995, by making all contractually required healthcare benefit payments or contributions, and WE WILL make whole our unit employees for any loss of benefits or expenses ensuing from our failure, since about February 18, 1995, to make required healthcare benefit payments or contributions.

BRANDY MINING, INC.